No. 89-1049

In The

Supreme Court of the United States

October Term, 1989

JANET M. DANESE, Individually and as Personal Representative of THE ESTATE OF DAVID DANESE, Deceased; LOUIS DANESE, SR., DANIEL DANESE, PAMELA DANESE, MARGARET DANESE, THOMAS DANESE, FRANCES DANESE, and LOUIS DANESE, Individually,

Petitioners,

v

THOMAS A. ASMAN, Individually and as Chief of Police of the City of Roseville; ROBERT PETERS, Individually and as Inspector for the City of Roseville; HOWARD HILL and FREDERICK STEIN, Individually and as Sergeants and Shift Commanders for the City of Roseville; STEVEN GOWSOSKI, ROBERT CHUCHRAN, DENNIS CARDINAL and RICHARD KENYON, Individually and as Police Officers of the City of Roseville,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS ASMAN, PETERS, HILL & STEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

– AND APPENDIX –

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RESPONDENTS ASMAN, PETERS, HILL & STEIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. ASMAN, ROBERT PETERS, HOWARD HILL AND FREDERICK STEIN, hereby respond to Petitioners' Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, respectfully requesting this Honorable Court deny same.

STATUTORY PROVISIONS

The statutory provisions involved in this matter are Michigan Statutes MCLA 28.221, MSA 4.451; MCLA 28.609, MSA 4.450(9); MCLA 791.262(5), MSA 28.2322 (5) and Michigan Administrative Code Regulations 791. 501(4), 791.503(4), 791.557(1), 791.603(2) and 791.641 (1)(c). Relevant portions of these are reproduced at Appendix A.

STATEMENT OF THE CASE

I.

THE NEED FOR CORRECTION

The following presentation of facts supplements and corrects the factual statement of the case submitted by the Petitioners.

No singular pleading cogently states the facts of this lawsuit. A Third Amended Complaint is the prevailing pleading. (R: 234) In summary, it avers (incorporating by reference) ¶¶ 1-147 of the First Amended Complaint, ¶¶ 129-147 of the Second Amended Complaint, Count XI of the Second Amended Complaint and then adds ¶¶ 148-161 as new averments.

Petitioners, confronted with repeated motions to dismiss and for summary judgment, chose to offer in

the record facts supplemental to their pleadings to avoid dismissal. (R: 135, 150, 169, 170 and 181) Petitioners offered the District Court Respondents' incident reports, authenticated and attested, in defense of motion for summary judgment. (R: 170, p 530)

Because Petitioners submitted these attested factual matters and because these facts provide a cogent correct statement of the case, Respondents submit Petitioners' offerings to supplement and correct the Statement of the Case. Respondents note the following materials were relied upon by the Petitioners in presenting their Statement of the Case, but were presented in conclusionary style, blurring important factual circumstances which should be considered. (Petitioners' Brief, p 2, fns. 1-2)

II.

THE OCCURRENCE AS CORRECTED

On November 9, 1982, David Danese was arrested in Roseville, Michigan at approximately 2:50 a.m. by Respondents Chuchran and Gowsoski. He was arrested for the offense of driving a motor vehicle while under the influence of alcohol. He was taken to the Roseville Police Station which had holding cells to house pretrial detainees pending arraignment. (R: 170, p 547)

Upon arriving at the Roseville Police Station, Officer Gowsoski processed Mr. Danese. His written report, prepared immediately subsequent to the suicide, reflects what transpired. Petitioners submitted this attested evidence to the District Court:

> . . . He was then taken to the police station and given a breath test. The subject registered 13% [*sic*] on the breathalyzer. Subjects [*sic*] property then inventoried where writer discovered subject

had 3 green and black capsules markings AHR 6257. He related they were for pain because he had been injured in the past, that is shot in the face. The capsules identified in PDR as Phenaphen with Codeine were confiscated and held as evidence.

Subject Danese then made a phone call, the way he was speaking sounded as if he spoke with his mother. It seemed he was concerned over the car that was impounded when he was arrested. The car belonged to his grandmother he was concerned that he needed to get the car to his mother this morning. From the conversation it sounded as if the mother was concerned on how and where, and how much it would cost to get the car out of the pond [*sic*]. Patl. Chuchran then handed card identifying towing service and location, to subject Danese. He then conveyed the information to his mother. His mother seemed persistent in her concern over the car from the conversation it seemed she needed the car this morning for a job interview. Also that she did not have the money for the impound fee. Danese then told his mother that he had $25.00 cash that in the morning she should stop at the station and pick up the money for the impound fee. That he didn't need the money, his bond was $100 and he was going to jail anyway. (He had conveyed to us his concern over the fact that he was recently on probation for a felony arrest and he felt that this would affect his probation status) He was crying as he ended the conversation with his mother. He then made another call to a person with whom he made arrangements for that person to pick-up his mother and transport her to the station. He then hung up the

> phone. He had high-cowboy type boots on he was told to remove same as he could not wear them in the cell area. He said, I cant [*sic*] kill myself with my boots they dont [*sic*] have any laces, I'm not going to do that anyway.
>
> Prior to his phone call, subject Danese was joking with a State Police prisoner. The subject was told to remove his laces from his shoes. Danese told the subject that he had to give up his laces to prevent his attempting suicide. Danese was jovial and joking with this other prisoner whose first name was David the same as Danese. (R: 170, pp 551-553)

Respondent Chuchran prepared a post-suicide report. Petitioners submitted his deposition-attested report to the District Court. Chuchran states, in pertinent part:

> When writers arrived at the station the M.S.P. [Michigan State Police] were using the booking room for a O.U.I.L. arrest.
>
> While waiting to use the breath test, David was telling a story about how he was shot in the jaw about 1 year ago.
>
> David also said that he was on Probation for a felony.
>
> The M.S.P. Officers Thompson and Harrington were in the process of taking property away from their prisoner. A David Anthony Pastorisa w/m 7-26-60. David then made a comment that 'They take everything away from you that you could hang yourself with.' David then took the breath test.
>
> While waiting for the results David was joking with the other prisoner David about having to

remove shoe laces so he couldn't hang himself. The conversation turned to being in a car accident while being drunk and dying — the two were obviously joking about being arrested.

David Danese then made a comment 'I wish I weren't here.' Writer then told David 'you really don't mean that.' David replied that 'he was $13,000 dollars in debt.' Writer replied that 'I am in debt for more than that.' David stated that 'I owe the doctors $8,000 and the hospital $5,000' for the gunshot wound to the face.

Writer told David that $13,000 wasn't that much. David then took the second breath test.

David was informed the [*sic*] he would be in jail until 8 am and he could be released on $100.00 cash bond. David then made a phone call.

Writer, sitting next to-David while he was talking on the phone. David was telling the person to come to the police station to get $25.00 so they could get David's grandmothers [*sic*] car out of the Impound yard. Writer gave David a card and explained where Wohlfield's was. David relayed the info to the person he was talking to. Writer believes he was talking to his mother. David, while talking to the person, had tears in his eyes. David said that she should get the car, and not to worry about him. David asked to make another phone call and was allowed to. Writer believed he called his father. David asked this Party to pick up his mother so she could get the car out of Impound, so she could get to work. David then hung up.

Patr. Gowsoski then had David remove his jewelry and empty his pockets.

> David emptied his pockets, removed his necklace & watch. David then said that his ring, (on his right hand) does not come off. David said 'If you want it off you'll have to break my finger. I can't hang myself with it anyways.' Patrol told David that he could keep the ring. David was then told to remove his boots he said 'why I can't hang myself with them.' David seemed to be joking with Patr. Gowsoski & myself. David seemed in good spirits as Patr. Gowsoski checked him for anymore property before placing him in the cell area. (R: 170, pp 554-556)

During the booking process, a breathalyzer test was administered by Respondent Cardinal. Cardinal, between the first and second test, overheard Mr. Danese state to a third person, "I wish I wasn't here." The post-suicide report, attested by deposition, was submitted in the record by Petitioners. It continues:

> Mr. Danese was asked what he meant and he replied 'Well ever since I was shot, there are medical bills in excess of $13,000.' He continued on to say 'and I don't know how I am going to pay them off.' The conversation went on about how Mr. Danese was shot in the face with his own gun and writer administered second breath test with results of .13% Writer finished the test and went up front to resume my dispatch duties.
>
> At approx. 5:15 a.m. 11-9-82 writer heard one or both of the prisoners banging on the bars and yelling for an officer. Writer went back to the cell block door and asked both prisoners what they wanted. Mr. Danese who was in the center cell replied he wanted a cigarette. Writer informed him that it was against the rules to smoke in the cell block area and for him to

> attempt to get some sleep. Mr. Danese replied 'If I don't get a cigarette, I'm going to hang myself.' Writer replied for him to go to sleep and returned to the dispatch area. Writer informed SGT Hill of the conversation between myself and the prisoner, Mr. Danese. SGT Hill advised that we would have to watch him.
>
> Writer began working on the daily log, occasionally looking up at the cell block cameras. The left camera which covered the cell block that Mr. Danese was in has poor visual qualities. It appears the picture tube is going bad as the border is coming in towards the center of the screen and it is difficult to view the cell block area. After finishing the log, writer ran a gun permit application through the computer and SGT Stein walked in from lunch. Writer walked back to the cell block for a 6 a.m. inspection and found Mr. Danese hanging from the bars with his white shirt. Writer ran up to the front and yelled to Officer Kenyon and SGT Stein that a prisoner was hanging in the cell block. Writer obtained the keys from the key rack and opened up the cell block doors. While Mr. Danese was being cut down, writer called for the Fire Dept. ambulance . . . (R: 170, pp 547-548)

Respondent Hill's post-suicide report was submitted to the District Court by Petitioners after being attested in deposition. In pertinent parts, the report states:

> After 4:00 a.m. Officer Gowsoski came to the front desk and informed writer that the arrested party said he needed a pillow because he could not lay flat because of an old injury. Officer Gowsoski was informed we did not have any pillow and to inform him of that. Sgt. Stein was

> in the station and was leaving about 5:10 a.m. At this time writer walked back through the cell block and checked the prisoners continued back to the garage checking the veh's parked outside through the garage windows. On returning to the radio room officer Cardinal informed writer the subject banging and yelling in the cell wanted a cigarette. When Cardinal informed him he could not smoke in the cell he (the prisoner) stated if I can't smoke I will hang myself. Writer informed Cardinal we would have to watch him. Approximately 5:20 a.m. officers Gabriel and Kenyon came into the station. Writer asked Gabriel to follow writer home and return him to the station after dropping his car off. Writer & officer Gabriel left the station about 5:35 a.m. to 5:40 a.m. As we returned to the station approximately 6:00 a.m. and notified by Sgt. Stein the above subject had hung [*sic*] himself in the cell[.] He had already been cut down and the Fire Department ambulance was on the way. (R: 170, pp 549-550)

Without explanation, Petitioners state "Between 5:35 a.m. and 5:56 a.m., Danese hanged himself." While the record does not reflect the actual source of this fact, Respondents presume it is culled from Sgt. Hill's extra-record deposition testimony at pages 82 and 90. Sgt. Hill has testified that he visually inspected David Danese before leaving the station to drop off his automobile and saw Mr. Danese standing and talking to prisoner Pastorisa.

In an apparent error, Petitioners state the Fire Department rescue truck arrived at "5:50 a.m.," which would be six minutes before Mr. Danese was discovered hanging. The record of the case indicates the Fire Depart-

ment rescue truck arrived at 5:59 a.m., within three minutes of the discovered hanging. (R: 150, p 427)

III.

MEDICAL AND SUICIDAL PRECAUTIONS IMPLEMENTED BY RESPONDENT ASMAN

Petitioners offered in the record Roseville Police Department procedures for housing prisoners, for provision of medications and medical attention, and for handling of inmates whenever an officer believed he was presented with a prisoner who was possibly suicidal. (R: 169, pp 515-516)

These protocols required:

> 4. Never place unconscious prisoner in jail.
>
> * * *
>
> 11. Sick and injured prisoners shall be afforded necessary medical attention.
>
> 12. Prisoners taken to medical facility shall be covered by incident report.
>
> 13. Only medication ordered by a physician shall be given to prisoners.
>
> a. Officers to notify shift commander if medication is required.
>
> b. Shall be administered by shift commander.
>
> c. Make supplemental incident loging [*sic*] all medication given. (R: 169, p 515)

Suicide prevention protocols issued by Respondent Asman were:

> The department expects officers to observe subjects arrested in attempt to identify those per-

sons that exhibit tendencies to commit suicide. General traits of a person so inclined are:

1. Most suicides occur within the first 12 hours of confinement.
2. Use of drugs or alcohol.
3. Recent loss of job.
4. Recent loss of loved one through death, divorce, or separation.
5. History of emotional illness.
6. Emotional problems at time of arrest.
7. History of previous suicide attempt.
8. Older persons have a higher suicide rate.

Should an officer observe one or more of these factors present in an arrested subject, and feel that the possibility of an attempt at suicide is present, then he shall notify the shift commander who will:

1. Determine if subject should be taken to mental facility.
2. Determine if subject should be taken to medical facility.
3. If subject is lodged in jail, place subject where he can be observed by video camera and other inmates, if possible.
4. Make hourly visits as required, and more frequently as circumstances dictate. (R: 169, p 516)

IV.

RESPONDENTS ASMAN AND PETERS' NOVEMBER 9, 1982 INVOLVEMENT

Respondent Asman is the Chief of Police for the City of Roseville. Respondent Peters is an Inspector with the Police Department. The Complaint does not allege either were present at the police station at the time of Mr. Danese's arrest and subsequent suicide.

The Complaint contends Chief Asman and Inspector Peters failed to train their staff in suicide risk assessment and prevention, and that they did not build a lockup in conformity with Michigan Regulations prior to the death of Mr. Danese. (R: 208, p 162)

The Petitioners' evidence submitted to the District Court reflects a new detention facility was being planned in 1982 and that actual construction occurred after Mr. Danese committed suicide. (R: 135, pp 410-415)

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT PROPERLY HELD THAT AS OF NOVEMBER 9, 1982, A CONSTITUTIONAL DUTY WAS NOT ESTABLISHED, NOR PARTICULARIZED, REQUIRING LOCAL POLICE OFFICERS TO IDENTIFY PRETRIAL DETAINEES AT RISK FOR SUICIDE, AND TO PREVENT SUICIDE THROUGH SUICIDE SAFE CONDITIONS OF CONFINEMENT AND/OR MEDICAL CARE WHICH WOULD PREVENT SUICIDE.

As an attempt to persuade this Court to issue Writ of Certiorari, Petitioners engage in an egregious characterization of the Sixth Circuit's decision in this case. To begin, the Opinion of the Sixth Circuit is reported in

an edited fashion. As reported in Petitioner's Brief, the Sixth Circuit Opinion is made to appear as though it recognized a clearly established duty:

> The Sixth Circuit states:
>
> > '. . . the plaintiffs and the district court in this case have not presented any cases that contradict the Fifth Circuit's holding . . . that a **constitutional duty to protect prisoners from self destructive behavior was clearly established** at the time Gagne was arrested . . .' (Cf. Petitioners' Brief, p 9, footnote 11, *emphasis supplied by Petitioners*)

Having quoted the Sixth Circuit Opinion as stated above, with selected emphasis, Petitioners then claim that the Sixth Circuit imposed an obligation upon them to cite precedent for the "very action" of the police officers showing such to have been "previously . . . unlawful." (Cf. Petitioners' Brief, pp 8-9)

The Sixth Circuit did not state that a Fifth Circuit decision had previously recognized the existence of a clearly established Constitutional duty to protect prisoners from self-destructive behavior. Contrary to the impression created by the Petitioners, the Sixth Circuit held there was not any clearly established duty:

> Our conclusion is supported by the decision of the Fifth Circuit in *Gagne* v *City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986), Cert. denied, 107 S.Ct. 3206 (1987). The court in *Gagne* held that a policeman who, in violation of a prison regulation, did not remove a belt from a detainee who later hung [*sic*] himself was entitled to qualified immunity. The court held that no cases were presented 'suggesting that a constitutional duty to protect prisoners from self-destructive

> behavior was clearly established at the time *Gagne* was arrested.' *Ibid.* As the events in *Gagne* took place after the events here and the plaintiffs and the District Court in this case have not presented any cases that contradict the Fifth Circuit's holding, we are led to the same conclusion the court reached in *Gagne*. (Petitioners' Appendix B, pp B-9 – 10)

The Sixth Circuit did not issue an opinion in this case indicating that any of the specific duties contended by Petitioners existed. The Sixth Circuit did not hold that any of the duties contended by the Petitioners were clearly established. The Sixth Circuit did not hold Petitioners to an exalted standard that Petitioners must show in addition to a general duty, and a clearly established duty, specific case precedent requiring the "very action" taken by the officers "previously been held to be unlawful."

The Sixth Circuit observed that pertinent case authority of the Fifth Circuit had previously held no clearly established Constitutional duty existed as contended by the Petitioners. The Sixth Circuit reinforced its observations by pointing out that neither the Petitioners, nor the District Court, had cited any authority that purportedly established as of 1982 a clear Constitutional duty as claimed in the pleadings.

Proceeding from the false assumption that the Sixth Circuit had recognized the existence of a clearly established duty pursuant to the *Gagne* decision, Petitioners then criticize the Sixth Circuit for not determining whether a substantial consensus of opinion existed at the time of the incident indicating that Respondents' course of conduct infringed upon the "right" so protected. (Petitioners' Brief, p 10)

Contrary to Petitioners' contentions, the Sixth Circuit was presented with pertinent law from many Circuits by all parties to this proceeding, including an *amicus curiæ* brief from the City of Detroit. The Sixth Circuit found no duty was clearly established as contended by the Petitioners.

In essence, the Petitioners contend that lay police officers were Constitutionally required, as of 1982, to be sufficiently educated to differentiate between the actions of a manipulative inmate and that of a serious, suicidally-inclined prisoner.

In attempting to persuade this Court to issue Writ of Certiorari, the Petitioners have also revised the facts of that claim in light of the disposition of the Sixth Circuit. Before the Sixth Circuit, the Petitioners readily acknowledged that David Danese stated to Officer Cardinal, "If I don't get a cigarette, I'm going to hang myself." (Petitioners' Brief on Appeal to the Sixth Circuit, p 9, ¶ 5)

However, in presenting the Statement of the Case to this Court, Petitioners omit reference to the actual statements made by the Decedent. Instead, this Court is told something different from that stated to the Sixth Circuit and something different from the undisputed evidence of record. This Court is told, "At approximately 5:15 a.m., Danese advised Officer Cardinal that he was going to 'hang' himself." (Petitioners' Brief, p 3)

Petitioners now seek to rely upon the pleadings, notwithstanding the undisputed record they have submitted to the lower courts. Petitioners seek to retreat to their First Amended Complaint, ¶ 29. That paragraph states, "At approximately 5:15 a.m., the Deceased informed Defendant CARDINAL that he was going to hang himself." (R: 38, p 28)

Petitioners contend this was "admitted" by Respondents. This naked allegation was admitted, since the undisputed evidence reflected that Danese used those very words when he said, "If I don't get a cigarette, I'm going to hang myself." The First Amended Complaint, thereafter, does not state the full text of his actual words, nor does the Third Amended Complaint allege these actual words used were an unequivocal threat as now suggested in the Petition.

In conclusion, it would appear that the Petitioners have misunderstood or misstated the legal reasoning of the Sixth Circuit. Moreover, the Petitioners have retreated from the admitted, attested, undisputed facts of the case to now suggest that the Decedent made an unequivocal threat and decision to commit suicide which was then ignored by the Respondents.

The case which the Petitioners would ask this Court to review is not the case that was pending before the District Court, nor is it the case that was reviewed by the Sixth Circuit.

A. The Decision Of The Sixth Circuit Does Not Conflict With Its Prior Opinions Regarding The Rendering Of Medical Care.

Prior to November 9, 1982, the Sixth Circuit had not held, or particularized, that local police officers must screen all prisoners and diagnose whether such prisoners were, in fact, suicidal. The Sixth Circuit had not ruled what conduct was lawful, or unlawful, regarding the management of a prisoner who was, in fact, suicidal.

The authorities cited by Petitioners would not have placed Respondents on notice that their custodial conduct towards David Danese was allegedly unlawful.

The operative facts of this case are simple and clear. David Danese did not make an unequivocal statement that he was going to hang himself. He did not request any medicine or medical care. While noting Respondents confiscated narcotics from Mr. Danese, Petitioners do not allege Mr. Danese had a lawful prescription for these drugs, or that he requested any of these narcotics for pain.

Fitzke v *Shappell*, 468 F.2d 1072 (CA 6, 1972), cited by Petitioners, involved a request for medical care for physical injuries sustained in an automobile accident. The Sixth Circuit held that such a request, coupled with circumstances clearly sufficient to indicate a need of medical attention, obliged custodial officials to provide medical care under the Due Process clause of the U.S. Constitution. The refusal to provide medical care as requested was the gravamen of the case, not the failure to diagnose conditions, differentiate real from imaginary, and then treat without request.

Shannon v *Lester*, 519 F.2d 76 (CA 6, 1975), cited by the Petitioners, involved a request by an injured motorist for medical attention while being transported to jail after his arrest for Driving While Intoxicated. The request was refused. A second request, which was again refused, was made at the jail to the jail deputy. Mr. Shannon manifested facial lacerations and swelling. He had a non-displaced fracture of the nose and a displaced fracture of the ulna (elbow). The *Shannon* Court held a detained person is entitled to necessary medical care on account of an injury or illness when requested, and a refusal by prison authorities, with knowledge of that condition, to provide medical care violates the due process rights of the prisoner.

The *Shannon* Court did not hold that the Due Process Clause imposed a duty on police officers to medically screen pre-trial detainees, diagnose conditions

despite lack of complaint or request for care, and then undertake unrequested medical treatment.

Scharfenberger v *Wingo*, 542 F.2d 328 (CA 6, 1976), cited by Petitioners, involved personal injury (an amputation) caused by the refusal of custodial officials to provide medical care recommended by a physician in consequence of the prisoner's prior self-injury. There, the Defendants had the benefit of prior medical diagnosis and medical instruction. Again, the gravamen of *Scharfenberger* does not pertain to the alleged failure of local lay police officials to diagnose conditions, differentiate real from imaginary, and then treat without request.

Westlake v *Lucas*, 537 F.2d 857 (CA 6, 1976), cited by Petitioners, involved pleas for medical assistance made by a prisoner by virtue of a bleeding ulcer. The prisoner told the jailers he suffered from an ulcer and requested appropriate medical attention — which was denied. In that case, the Sixth Circuit did not hold that local jailers must medically screen prisoners for undisclosed problems, diagnose and differentiate real from imaginary, and then treat without request.

Petitioners contend that the Sixth Circuit failed to follow the decisions of *Roberts* v *City of Troy*, 773 F.2d 720 (CA 6, 1985) and *Davis* v *Holly*, 835 F.2d 1175 (CA 6, 1987), neither of which declares the duties claimed here. More importantly, Petitioners do not explain how the Respondents would have known of the law discussed in these two cases decided years after the incident in this case.

In summation, these proffered authorities do not support Petitioners' contentions of an established legal duty, much less that such duty was "clearly established."

B. The Decision Of The Sixth Circuit Does Not Conflict With The Decisions Of The Second, Third,

Fourth, Fifth, Seventh, Eighth, Tenth And Eleventh Circuits.

Petitioners contend the Sixth Circuit's Opinion in this case contradicts binding precedent from numerous Circuits. Petitioners' cited authorities, most of which were published after Mr. Danese's death, do not hold that a police officer must medically screen for suicide risk, diagnose and provide suicide-safe facilities:

Bishop v *Stoneman*, 508 F.2d 1224 (CA 2, 1974) involved a review of what evidence was sufficient to show deliberate indifference in the context of indifference to medical needs. *Bishop* does not declare the duties averred by the Petitioners, nor is it a Rule 56 case.

Colburn v *Upper Darby Township*, 838 F.2d 663 (CA 3, 1988), cited by Petitioners, involved an incident that occurred three years after Mr. Danese's death. Moreover, unlike this incident, the prisoner was not searched, suicidal precautions were not taken, and supervision was not established. The victim was specifically known to police as having actually attempted suicide and was a known suicide risk. Finally, *Colburn, supra*, did not involve a Rule 56 motion, as does this case. Cf. *Colburn*, p 669.

Bowring v *Godwin*, 551 F.2d 44 (CA 4, 1977), involved a request by a prisoner for psychiatric diagnosis and treatment. More importantly, *Bowring* required treatment be provided if a physician or medical care provider, using his medical skills, concluded with a certainty the prisoner's symptoms evidenced a serious medical need, which may be substantially alleviated.

Partridge v *Two Unknown Police Officers*, 791 F.2d 1182 (CA 5, 1986) did not hold local police must screen and diagnose suicide risks on or before 1982. Moreover, *Partridge* was not a qualified immunity decision. *Gagne, supra*, which was a qualified immunity case, specifically discussed the applicability of *Partridge*, and held qualified immunity applied to a May 17, 1983 suicide:

> Indeed, the case of *Partridge* v *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. (*Gagne*, p 560)

Cleveland-Perdue v *Brotsche*, 881 F.2d 427 (CA 7, 1989) is factually distinguishable. This prison case observed that the absence of systemic medical measures (policies, records, training) was actionable in the context of medical services rendered by medical professionals at a permanent detention facility. Petitioners have documented the opposite occurred in this case, namely, Respondent Asman implemented medical protocols and suicide protocols to remedy a 1977 occurrence of suicide. *Cleveland-Perdue* is not authority for the duties advanced by the Petitioners.

Finney v *Arkansas Board of Corrections*, 505 F.2d 194 (CA 8, 1974) is a penitentiary case which does not address the duty claimed by Petitioners. It is not a suicide case, nor does it address the specific duties otherwise owed by temporary detention lay personnel to prisoners who might pose a risk for suicide.

Garrett v *Rader*, 831 F.2d 202 (CA 10, 1987) involved the intentional physical abuse, and ultimate death, of a mentally retarded patient, apparently judicially committed to a state institution. Petitioners fail to explain how this authority establishes the alleged 1982 duties of suicide diagnosis and prevention asserted applicable to police officers who temporarily detain arrestees.

Waldrop v *Evans*, 871 F.2d 1030 (CA 11, 1989) involved the duties of a prison physician owed a psychiatric patient. This case does not address the responsibilities of a police officer owed to a temporarily detained arrestee, much less a duty of a police officer to diagnose and manage a suicidal person.

Having argued the applicability of the foregoing authorities, Petitioners then criticize the Sixth Circuit for observing the risk presented by Mr. Danese was one of uncertainty. To state the Sixth Circuit's observations are "irrelevant," on the premise that Mr. Danese, unequivocally, announced he was going to "hang himself," is to argue from a false premise. Cf. Petitioners' Brief, p 13. It is the Petitioners who documented the undisputed uncertainty of Mr. Danese's intentions by submitting his actual remarks to the Sixth Circuit. Mr. Danese's complete, actual words were, "If I don't get a cigarette, I'm going to hang myself" and not, "I'm going to hang myself."

Since the Sixth Circuit relied upon the undisputed, attested facts of record, Petitioners should not take umbrage over the Sixth Circuit's observation that Respondents could not be certain that Mr. Danese would attempt suicide:

> How much more certainty is required?
>
> Danese told the officers he needed psychological help; he said, 'I'm going to hang myself.' The officers decided 'we better watch him.' Petitioners submit that's as certain as it gets. (Petitioners' Brief, p 14)

A Writ of Certiorari should not issue on matters fabricated from whole cloth. Petitioners cite no attested fact or pleading which states Mr. Danese told anyone he needed psychological help or made an unequivocal threat. Most assuredly, Petitioners did not advise the Sixth Circuit of any such extra-record claims.

II.

THE SIXTH CIRCUIT DID NOT ERR IN DETERMINING A "HISTORIC LIBERTY INTEREST" IN "SAFE CONDITIONS OF CONFINEMENT" WAS NOT CLEARLY ESTABLISHED AND PARTICULARIZED IN 1982 SUCH THAT

LOCAL POLICE OFFICIALS MUST PROVIDE SUICIDE-PROOF FACILITIES TO UNDIAGNOSED PRE-TRIAL DETAINEES NOT OTHERWISE REQUESTING MEDICAL ATTENTION.

Petitioners contend the decision of the Sixth Circuit is "in direct conflict" with the Court's decision in *Youngberg* v *Romeo*, 457 U.S. 307, 73 L. Ed.2d 28, 102 S.Ct. 2452 (1982). (Petitioners' Brief, p 15)

Petitioners do not explain how the facts in *Youngberg, supra*, would have apprised Respondents that it would be unlawful to house an undiagnosed pre-trial detainee, who did not request medical or psychological treatment, in anything but suicide-proof custodial facilities.

The victim in *Youngberg* was a judicially-declared incompetent. Inherent in the status of the victim was that his medical condition (mental retardation) was previously diagnosed and adjudicated. With these matters previously determined, and with specific knowledge that Romeo had suffered up to 63 injuries, some self-inflicted, it was incumbent upon those custodians to provide appropriate facilities for management of the incompetent who was actively attempting self-injury or was being victimized by assault.

The facts of *Youngberg, supra*, are a far cry from Danese's attempts to manipulate Respondent Cardinal for a cigarette. The record fairly admits Danese knew the Roseville Police were trained to take measures to prevent prisoner suicide and were, in fact, doing just that when he was housed. He knew they were considerate of his feelings and had tried to reassure him that his financial troubles were not as bad as stated. The objective facts admit he tried to manipulate their concerns for his well-being and for preventing suicides by demanding a cigarette in the manner that he did.

Notwithstanding, Petitioners translate *Youngberg, supra,* into an apparent judicial fiat that all police lockups throughout the United States must be immediately refitted/rebuilt such that undiagnosed pre-trial detainees cannot effect an act of suicide. Petitioners' facile contentions ignore whether such technology actually exists.

The record reflects that Petitioners have admitted local police facilities are not required to have CCTV. (R: 1Z0, p 534, ¶ 4) Contrary to Petitioners' contentions, the record admits that Mr. Danese was properly held in a holding cell, which is precisely what Michigan Department of Corrections Regulations appear to require:

> "Lockup" means a facility operated by a unit of local government for the physical detention and correction of persons charged with or convicted of criminal offenses for a period of less than 48 hours. (1979 AC R. 791.503(4))
>
> * * *
>
> A * * * lockup shall provide 1 or more holding cells * * * .(1979 AC R. 791.557(1))
>
> * * *
>
> "Detoxification cell" means a cell used to temporarily hold 1 or more chemically impaired persons during the detoxification process until they can care for themselves and be moved to general housing areas. (1979 AC R. 791.501(4))
>
> * * *
>
> A person confined to a detoxification cell shall be moved to a general housing area as soon as he can properly care for himself. (1979 AC R. 791.641(1)(c))

The record objectively admits that David Danese could not care for dangerous machinery operated on a public highway at 2:50 a.m. on November 9, 1982. In

contrast, the record admits Mr. Danese could care for himself subsequent to his arrest. The record does not reflect that David Danese was detoxifying. (Petitioners persistently insist in using the term "detoxification," equating it with "sobering." The Federal judiciary does not. See *Alberti* v *Sheriff of Harris County, Texas*, 406 F.Supp. 649, 677 (1975). Nor does the corrections health care industry. See the analysis provided by *amicus curiæ* brief to the Sixth Circuit.)

Petitioners' actual contentions address matters of police officer judgment concerning appropriate housing decisions standardized by state regulations, discussed above, which were repealed in 1984. MCLA 791.262(5); MSA 28.2322(5).

The alleged violation of state regulations (notably now repealed) fails to state a claim under 42 U.S.C. § 1983. *Davis* v *Scherer*, 468 U.S. 183, 82 L.Ed.2d 139, 104 S.Ct. 3012 (1984); *Williams* v *City of Lancaster, Pa.*, 639 F.Supp. 377 (E.D. Pa., 1986); *Wright* v *Wagner*, 641 F.2d 239 (CA 5, 1981).

Petitioners have not shown any error of the Sixth Circuit's holding that the "right" asserted by Petitioners was not particularized such that Respondents would have known their conduct unlawfully violated the Constitutional rights of David Danese.

III.

PETITIONERS HAVE NOT SHOWN THE COURT SUFFICIENT JUSTIFICATION TO WARRANT A WRIT OF CERTIORARI IN THIS CASE TO CONSIDER WHETHER A PRE-TRIAL DETAINEE HAS A CONSTITUTIONAL RIGHT TO BE PREVENTED FROM COMMITTING SUICIDE.

Petitioners have retreated from their admissions that the attested facts of the case do not show Mr. Danese made an unequivocal, serious threat of committing suicide.

Because it was so, Petitioners must advocate a duty to diagnose a psychiatric malady and prevent a suicidal occurrence without necessity of a request from the prisoner.

Respondents have restated the Petitioners' instant contention that an intoxicated prisoner, who "manifests suicidal ideation through threats or otherwise" is owed a duty of diagnosis and prevention under the U.S. Constitution. Respondents feel it is of little moment that a seriously suicidal inmate is male, female, sober, drunk, drugged, old, young, white, black, United States citizen, or not. Respondents do not believe the rights of any human being should be predicated upon such distinctions or "profiles" proffered by Petitioners in their Third Amended Complaint. (R: 234) Respondents believe these distinctions suggested by Petitioners are merely self-serving and do not seriously address an issue of Constitutional import.

Respondents contend this Court should not issue a Writ to address this issue suggested by petitioners. Petitioners offer this Court a simple solution to a complex problem; namely, that a lay police officer can be reliably trained by someone to reasonably diagnose a certain suicide risk and can prevent that occurrence with suicide-proof facilities. Petitioners have not made any showing in this record at any time such a reliable, simple solution exists.

The record should reflect that the City of Detroit submitted a brief *amicus curiæ* to the Sixth Circuit. That record brief provided the Sixth Circuit with a survey of "accreditation standards" pertinent to housing structures for pre-trial detainees, industry criticisms concerning use of CCTV for management of prisoners, and the genesis of general data being developed circa 1981 which investigated suicides in jails and how such occurrences might be prevented.

As that brief demonstrated, practical concepts of suicide detection and prevention were in the nascent stage in 1982, and continue to be developed.

Respondents believe this Court should hesitate to accept Petitioners' invitation to declare a duty existed in 1982 absent objective, reasonable assurances that ordinary policemen were capable of the task of fulfilling that duty.

In the final analysis, Respondents submit the issue herein raised is not the issue that was raised on appeal. The question raised is whether Respondents have qualified immunity for want of a clearly-established duty owed to David Danese which was particularized on or before November 9, 1982.

IV.

THE SIXTH CIRCUIT DID NOT IGNORE PETITIONERS' ALLEGED DUE PROCESS CLAIMS ASSERTED PURSUANT TO ADMINISTRATIVE REGULATIONS, NOW REPEALED, ADOPTED BY THE MICHIGAN DEPARTMENT OF CORRECTIONS.

Petitioners contend now-repealed administrative regulations of the State of Michigan, Department of Corrections, pertinent to various aspects of the operation and structure of local lockups, created a Constitutional "liberty interest" right under the Due Process Clause.

Petitioners fail to specifically identify the "liberty" they claim was violated. Petitioners fail to identify the "specific substantive predicates" that limited the discretion of Respondents as to how training should be done, the subject matter of that training, how suicidals would be determined and what should be done with a person who is determined to be suicidal. *Kentucky Department of Corrections* v *Thompson*, __ U.S. __, 104 L.Ed.2d 506, 109 S.Ct. 1904 (1989).

In an attempt to reach a threshhold argument, it appears that Petitioners argue certain regulations were "mandatory." Petitioners do not offer how these regulations applied to this case, or how these regulations provided specific limitations on the discretion or judgment of Respondents. (Petitioners' Brief, p 19)

Notwithstanding, Petitioners tell this Court:

> Review of the Michigan rules enacted seven (7) years before Danese's death and the existing case law establishes that Danese had an objective expectation that Respondents would operate, administer, staff and maintain their facility and equipment in conformity with these mandatory rules." (Petitioners' Brief, p 18)

The rules cited do not specifically require police officers provide diagnosis of suicide, or provide suicide-proof housing as claimed by Petitioners. The training regulations cited by Petitioners do not state what kind of training is required, nor do these regulations oblige Respondents to employ State training. (Petitioners' reference to 1979 AC R. 791.603(2) deleted the discretionary language of that rule. See Respondents' Appendix A for full text.) Petitioners' claims pertain to their displeasure over how Respondents exercised their discretion in fulfilling their regulatory duties.

Petitioners' current argument appears to be the rearguard of a failed argument that David Danese had a clearly established right, particularized as of 1982, to suicide prevention facilities and suicide screening, diagnosis and management via regulations, now repealed. Petitioners cite no administrative rule imposing such specific obligations upon Respondents.

The Sixth Circuit rejected Petitioners' contention that Michigan's since-repealed regulations created Constitutional rights, thinly veneered as a due process

"liberty interest," or otherwise. See fn. 5 at Petitioners' Appendix, p B-12.

V.

THE SIXTH CIRCUIT DID NOT ERR BY ALLEGEDLY IGNORING FACTS RECOGNIZED BY THE DISTRICT COURT.

Petitioners apparently assert that review in the Sixth Circuit is bridled by the District Court's assessment of the record, including undisputed facts not considered by the District Court. Petitioners cite no applicable authority for such proposition. If the District Court erred in its assessment of the record, procedurally or otherwise, it is the function of the appellate courts to review and correct that error.

Thus, for example, Petitioners assert that their contentions for construction of local law are binding upon the judiciary. They claim the Sixth Circuit erred in not accepting their contention that Michigan administrative regulations were *minimum* mandatory standards, citing no authority other than an apparent extra-record speech by a political official. (Petitioners' Brief, p 20)

More importantly, Petitioners appear to complain that the Sixth Circuit should not have accepted Petitioners' offered and admitted attested facts concerning the events which took place in this case. (See Statement of the Case, *supra*.) Petitioners offer this Court no valid justification for the contention that the Sixth Circuit erred in this respect.

Petitioners take exception with the Sixth Circuit for not accepting their contention that Respondent Asman is a liar, asserting his police officers were not trained to handle medical emergencies. Apparently, Petitioners believe the Sixth Circuit must ignore Petitioners' offered attested facts which show Respondent Asman issued to his staff protocols for medical management of

prisoners and for management of suicidal prisoners. (See Statement of the Case, *supra.*)

Petitioners apparently believe the Court must ignore the fact that since 1977 all Michigan police officers, with limited exceptions, must be academy-trained and certified. (MCLA 28.609; MSA 4.450(9)) and that such training must include First Aid (MCLA 28.221; MSA 4. 451). At no time have Petitioners averred the Respondents employed any Roseville Police Officer in violation of these mandatory laws. It appears that Petitioners' complaints pertain to a lack of more training.

Petitioners submit to this Court, and the Sixth Circuit, that Respondent Asman did nothing concerning these issues, but then state he issued pertinent medical and suicidal protocols on March 30, 1978. And, as though persuasive of the issue, Petitioners even note that, thereafter, a June 9, 1980 suicide attempt was thwarted by Roseville Police. (Petitioners' Brief, p 22)

Respondents submit the claim that more training or better training fails to state a claim under 42 U.S.C. § 1983. *Beddingfield* v *City of Pulaski*, 861 F.2d 968 (CA 6, 1988).

Petitioners seem to be undaunted by the fact that they have shown this Court, and the Sixth Circuit, that no act of deliberate indifference appears to have occurred in this incident. Petitioners have shown this Court, through their record motion responses, that Respondents specifically removed items from prisoners which could serve as instruments commonly used in suicidal hangings. Petitioners have shown this Court that surveillance of Mr. Danese was enhanced when he made his manipulative remarks. Petitioners have not shown any conduct of Respondents which was tantamount to an intent to punish anyone, including Mr. Danese. Cf. *Roberts, supra.*

At oral argument of this case before the Sixth Circuit, Counsel for Petitioners was confronted by the Court with the question of what act of deliberate indifference occurred, in light of the actions of Respondents Hill and Cardinal. Counsel seemed unable to intelligently answer.

In sum, this proffered issue is without merit. Petitioners' complaint seems to be that Respondents' demonstrated concerns for the welfare of Mr. Danese could have been manifested in a different way. That is possibly true, but alternative methods of concern do not make the attested acts of concern "acts of deliberate indifference," much less violations of any clearly established duty.

VI.

THE SIXTH CIRCUIT DID NOT ERR BY APPLYING THE WRONG STANDARD OF REVIEW ON A MOTION FOR SUMMARY JUDGMENT BY INCLUDING IN THEIR OPINION UNDISPUTED, ATTESTED FACTS OF RECORD SUBMITTED BY PETITIONERS.

Petitioners premise their argument on the contention that Respondents' Motion for Summary Judgment was submitted under F.R.C.P. 12(b)(6). It was not. Respondents' Motion for Summary Judgment was submitted under F.R.C.P. 56, as well. (R: 196, 215) Accordingly, the Respondents' defense addressed any undisputed, attested material facts that were developed subsequent to the pleadings. This was recognized by Petitioners who responded by providing the lower courts with the matters Respondents have previously discussed.

Apparently, Petitioners believe it is necessary to retreat from reality into fiction — at the expense of the Sixth Circuit and Respondents. As though Respondents suffer amnesia, Petitioners tell this Court that the only possible source of the data reported by the Sixth Cir-

cuit was evidence excluded by the Sixth Circuit. (Petitioners' Brief, p 26)

Respondents submit that even if the Petitioners had not offered the attested facts which were accepted by the Sixth Circuit, the Sixth Circuit was well within its authority under F.R.C.P. 56, in reviewing a motion of qualified immunity, to examine the record to cull the undisputed, attested material facts. *Unwin* v *Campbell*, 863 F.2d 124 (CA 1, 1988).

CONCLUSION

The Sixth Circuit properly concluded Respondents were entitled to qualified immunity because the alleged duties asserted by the Petitioners were not clearly established on November 9, 1982. Petitioners have not cited any case reflecting similar factual circumstances whereby the particularization requirement of *Anderson* v *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 90 L.Ed.2d 523 (1987), was demonstrated and satisfied on November 9, 1982. Even now, some eight years after the death of Mr. Danese, Petitioners have not cited any authority for the specific propositions they advance.

Respondents request this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: January 29, 1990

APPENDIX TO BRIEF IN OPPOSITION

• • •

APPENDIX A

RELEVANT STATUTORY PROVISIONS

MCLA 28.221

Sec. 1. The department of public safety is hereby authorized to establish and conduct a school for the instruction of law enforcing officers of this state and of the several counties, townships, cities and villages thereof, such school to be known as the Michigan training school for peace officers and to be conducted and the sessions and periods thereof to be held at East Lansing and at such other places in the state as the commissioner of public safety shall designate. Provision shall be made for instruction in the following subjects and such others as the commission of public safety shall deem expedient.

(a) Identification of criminals and fingerprinting;

(b) Methods of crime investigation;

(c) Rules of criminal evidence;

(d) Presentation of cases in courts;

(e) Making of complaints and securing of criminal warrants;

(f) Securing and use of search warrants;

(g) Enforcement of general criminal laws;

(h) Small arms instruction;

(i) Regulation of traffic and uniformity in enforcement;

(j) First aid;

(k) Ethics of the police profession;

(l) Courtesy in performance of duty;

(m) Jui Jitsu;

(n) Extent of police authority;

(o) Confessions and statements.

MCLA 28.609

Sec. 9. (1) The council shall prepare and publish minimum employment standards with due consideration to varying factors and special requirements of local police agencies relative to:

(a) Minimum standards of physical, educational, mental, and moral fitness which shall govern the recruitment, selection, and appointment of police officers.

(b) The approval of police training schools administered by a city, county, township, village, or corporation.

(c) Minimim courses of study, attendance requirements of at least 240 instructional hours, equipment, and facilities required at approved city, county, township, village, or corporation police training schools.

(d) The requirements in subdivision (c) shall be waived if the following occur:

(i) The person has previously completed the mandatory training requirements and

less than 1 year of police service, has voluntarily or involuntarily discontinued his work as a law enforcement officer, and is again employed within 1 year after discontinuing work as a police officer.

(ii) The person has served more than 1 year and less than 5 years, has completed the mandatory training requirements, and takes employment with another police agency within 18 months of discontinued service.

(iii) The person has served 5 years or more and takes employment with another police agency within 2 years of discontinued service.

(iv) The person is a member of a sheriff's posse or police auxiliary temporarily engaged in the performance of his duties and while under the direction of the sheriff or police department.

(e) Minimum qualifications for instructors at approved police training schools.

(f) Minimum basic training requirements which regularly employed police officers excluding sheriffs shall complete before being eligible for employment.

(g) Categories or classifications of advanced in-service training programs and minimum courses of study and attendance requirements for these categories or classifications.

(h) The establishment of subordinate regional training centers in strategic geographic locations in order to serve the greatest number of

police agencies that are unable to support their own training programs.

(i) Acceptance of certified basic police training and experience received in states other than Michigan in fulfillment in whole or in part of the minimum employment standards prepared and published by the council.

(2) Notwithstanding any other provision of this statute, a regularly employed person employed on or after January 1, 1977, as a member of a police force having a full-time officer shall not be empowered to exercise all the authority of a peace officer in this state, nor employed in a position which is granted the authority of a peace officer by statute, unless the person has complied with the minimum employment standards prepared and published by the council pursuant to this section. Law enforcement officers employed before January 1, 1977, may continue their employment and participate in training programs on a voluntary or assigned basis but failure to meet standards shall not be grounds for dismissal of or termination of employment. A law enforcement officer employed before January 1, 1977 who fails to meet the minimum employment standards established pursuant to this section and who voluntarily or involuntarily discontinues his work as a law enforcement officer may be employed with a law enforcement agency if that officer meets the requirements of subsection (1)(d)(iii).

MCLA 791.262(5)

(5) Except as provided in subsection (3), the department shall not supervise and inspect, or promulgate rules and standards for the administration of, holding cells, holding centers, or lockups. However, the department shall provide advice and services concerning the efficient and humane administration of holding cells, holding centers, and lockups at the request of a local unit of government.

1979 AC, R. 791.501(4)

(4) "Detoxification cell" means a cell used to temporarily hold 1 or more chemically impaired persons during the detoxification process until they can care for themselves and be moved to general housing areas.

1979 AC, R. 791.503(4)

(4) "Lockup" means a facility operated by a unit of local government used to detain persons charged with or convicted of criminal offenses for a period of less than 48 hours.

1979 AC, R. 791.557(1)

(1) A jail or lockup shall provide 1 or more holding cells with not less than 150 square feet of floor space or not less than 15 square feet per inmate, excluding benches, at capacity of the holding cell.

1979 AC, R. 791.603(2)

(2) It is recommended that the administrator should develop and implement a continuing orientation and in-service training program for correctional staff in conjunction with the standards recommended by the commission and training sponsored by the department of corrections.

1979 AC, R. 791.641(1)(c)

(1) A person arrested shall be confined or separated in a jail or lockup in the following manner:

* * *

(c) A person confined to a detoxification cell shall be moved to a general housing area as soon as he can properly care for himself.